

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELDEN M. ALMBERG and U.S. POSTAL SERVICE,  
POST OFFICE, Fargo, ND

*Docket No. 98-2262; Submitted on the Record;  
Issued October 6, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he had a recurrence of disability effective May 9, 1997; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On June 4, 1991 appellant, then a 43-year-old mail processor, was lifting trays of mail when he developed pain in his lower back. He stopped working that day and did not return thereafter. He received continuation of pay for the period June 5 through July 19, 1991. The Office accepted appellant's claim for lumbar strain and a herniated L5-S1 disc and began payment of temporary total disability effective July 20, 1991.

In a March 31, 1997 letter, the employing establishment offered appellant a position as a modified clerk. Appellant accepted the job offer and began working on April 2, 1997, four hours a day. He stopped working on April 29, 1997 having worked no more than four hours a day. The Office paid compensation for the hours appellant did not work between April 2 and May 9, 1997.

Appellant filed a claim for continuing compensation for the period beginning May 10, 1997. In a December 1, 1997 letter, the Office informed appellant that it was deferring his request for compensation because he had been released to return to his limited-duty job, eight hours a day. The Office stated that appellant had failed to submit sufficient medical evidence to show that he was disabled for the period after May 10, 1997. The Office indicated that failure to provide sufficient medical evidence by January 2, 1998 would result in denial of his claim for compensation. In a March 9, 1998 decision, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to establish that the claimed recurrence of disability was causally related to the June 4, 1991 employment injury.

In an April 13, 1998 letter, appellant requested a hearing before an Office hearing representative. In a May 29, 1998 decision, the Office denied appellant's request for a hearing

as untimely and, upon further review, found that the issue in the case could be equally well addressed by submitting additional evidence and requesting reconsideration.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>1</sup>

In a December 4, 1996 report, Dr. Scott E. Turner, an osteopath, indicated that appellant was released back to work at four hours a day with a possible increase in work hours after two weeks. Dr. Turner reported that appellant could sit 30 to 45 minutes at a time for 1 to 4 hours a day. He noted appellant could walk intermittently four hours a day and lift intermittently for one to two hours. Dr. Turner indicated appellant could perform intermittent bending, squatting, climbing, kneeling and twisting. He stated that appellant could stand intermittently no more than 30 minutes duration, up to 1 hour a day. Dr. Turner reported that appellant's lifting restrictions were 0 to 10 pounds.

The employing establishment based its job offer to appellant on the work restrictions given by Dr. Turner. The employing establishment indicated that appellant would sit up to 4 hours intermittently for 30 minute duration, walk intermittently up to 4 hours as tolerated, stand up to 1 hour a day intermittently for 30 minute duration, lift up to 10 pounds for 2 hours a day intermittently and perform minimal bending and kneeling.

In a May 2, 1997 report, Dr. Turner indicated appellant had limitation in motion in the back with shooting pains. He noted significant muscle spasms in the lumbar spine on palpation. Dr. Turner indicated that he was taking appellant off work and classifying him again as temporarily totally disabled.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard Edwards, a Board-certified family practitioner, for an examination and second opinion. In a June 7, 1997 report, Dr. Edwards diagnosed chronic lumbar strain with degenerative disc disease at L4-5 and possibly other levels. He commented that there was no obvious evidence clinically or on x-ray, computerized tomography scans or magnetic resonance imaging scans that appellant had frank rupture of a disc. Dr. Edwards stated that he found little objective evidence in appellant's examination other than his inability to twist and turn which he felt was somewhat voluntary. He noted appellant had complaints of pain even on light superficial touch over his back on the left side or his left sciatic notch. Dr. Edwards found no obvious objective findings to substantiate appellant's marked complaints of pain and stiffness.

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<sup>1</sup> *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

He commented that appellant apparently had a voluntary tightness of the gluteal muscles and was not willing to bend, twist or turn his lower back. Dr. Edwards found no evidence of atrophy or muscle wasting. He stated that appellant's straight leg raising was normal. Dr. Edwards indicated appellant had no sensory or motor deficiency. He concluded appellant could perform his modified clerk duties eight hours a day.

In a July 10, 1997 note, Dr. Turner indicated that he disagreed with Dr. Edwards' report. In an August 8, 1997 letter, Dr. Turner submitted a copy of January 30, 1992 discogram, which showed herniated discs from L2-3 to L5-S1 with annular tearing at L5-S1. He also noted nerve root compression at L2 and facet degenerative joint disease at L4-5. Dr. Turner stated that, based on these results, his opinion had not changed.

In an October 21, 1997 letter, the Office again offered appellant the modified clerk position. Appellant indicated that he reluctantly accepted the offer, noting that Dr. Turner had not cleared him to return to work. In a November 6, 1997 report, Dr. Turner stated that appellant continued to have limited motion and could only tolerate short periods of activity. He found that appellant's straight leg raising was to 35 degrees with pulling sensation in the low back. Dr. Turner released appellant to work with reservations, stating that he expected the same result as the previous attempt to return to work. In a November 20, 1997 report, Dr. Turner indicated appellant had a failed attempt to return to work. He reported that appellant's motions of the back were reduced with considerable guarding. Dr. Turner noted appellant had severe discomfort, paraspinal muscle spasm and rigidity of the lumbar spine with flattening of the lumbar curve. He stated that straight leg raising was 15 degrees bilaterally with pulling in the low back. Dr. Turner concluded that appellant had significant muscle spasm from the increased activity which was not a new injury. He diagnosed herniated discs from L3-4 to L5-S1 with L3 ganglion impingement and L2-3 and L3-4 nerve root involvement. Dr. Turner also diagnosed discogenic pain L2-3, L3-4 with annular tearing L2-3 through L5-S1 and multiple levels of degenerative disc disease. In a February 4, 1998 report, he repeated his diagnoses and his description of the findings on examination of appellant. Dr. Turner stated that the findings from the scans performed still remained and were the reason appellant was disabled in 1997 through 1998.

Dr. Turner concluded that appellant was disabled for work and indicated that he had several herniated discs with some nerve root impingement. He gave extensive descriptions of appellant's pain and limitations of motion of the back which were contrary to the descriptions given by Dr. Edwards. Dr. Edwards, on the other hand, found no objective evidence of any condition that would substantiate appellant's claims of pain and stiffness. He commented that the x-rays and scans he reviewed showed no frank evidence of disc herniation. Dr. Edwards stated appellant had no evidence of sensory or motor deficit and no evidence of atrophy. Drs. Turner and Edwards, therefore, gave directly contrary findings of appellant's physical condition and reached contradictory conclusions on whether appellant remained disabled or could return to work at the position offered by the employing establishment. The case must, therefore, be remanded for referral of appellant to an appropriate impartial medical specialist. The specialist should be requested to give a complete description of appellant's physical findings, particularly whether appellant has any herniated lumbar discs. He should discuss whether these findings are causally related to appellant's June 4, 1991 employment injury. The

specialist should then give his rationalized opinion on whether appellant's disability after May 9, 1997 was causally related to his June 4, 1991 employment injury.<sup>2</sup>

The decisions of the Office of Workers' Compensation Programs, dated May 29 and March 9, 1998, are hereby set aside and the case remanded for further development consistent with this decision of the Board.

Dated, Washington, DC  
October 6, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>2</sup> In view of the Board's finding in this case, the Board will set aside the May 29, 1998 decision denying appellant's request for a hearing before an Office hearing representative.